

LEGAL GUIDANCE

ETHICS ISSUES IN THE BRAC PROCESS

With the Department of Defense downsizing its defense missions, the Base Closure and Realignment Commission (BRAC) has had a major impact on both military and civilian personnel throughout the United States. Below are frequently asked questions and answers involving Ethics issues in the BRAC process.

Question 1: May a federal employee (including military personnel) write or lobby Congress with respect to BRAC?

Answer: Yes, if in his or her personal capacity (off-duty, not using Government resources, not disclosing non-public information, and not using his or her position or authority).

Question 2: May a federal employee join a local (non-governmental) group that seeks to influence BRAC?

Answer: Yes, in his or her personal capacity, and, only to the extent that the employee's activities do not "compromise his or her efficiency or integrity as an employee or the neutrality, efficiency, or integrity of the agency." (5 C.F.R. 734.203.) In this respect, it is likely that personal actions by the installation commanding officer are more circumscribed than those of a less prominent base employee. Of course, official time, Government property, position or title, or non-public information may not be used.

Question 3: May a federal employee be assigned, as part of his or her official duties, as liaison to a local group that seeks to influence BRAC?

Answer: Yes. Section 3-201 of DoD 5500.7-R, Joint Ethics Regulation, permits assignment of federal employees to non-

Federal entities when there is a significant and continuing Department of the Navy (DON) interest to be served by such representation. These employees represent the DON's official interests and should guard against disclosing non-public information, rendering preferential treatment to the group, or taking sides in disputes. In a liaison role, federal employees cannot vote or participate in the management of the group.

Question 4: May the federal employee vote or participate in management of such a group?

Answer: Possibly. Section 3-202 of the Joint Ethics Regulation permits federal employees to participate in their official DON capacities in the management of non-Federal entities if authorized by SECNAV. Alternatively, federal employees may also take a management role in their personal capacities. However, as the federal employee takes a more visible or prominent role in the group, the likelihood that such activities may compromise the employee's efficiency or integrity or, the neutrality of the agency, also increases.

Question 5: May active-duty military personnel accept positions on a "Local Redevelopment Authority" that is a part of the local or state government?

Answer: If the DON organization or command desires to establish an official liaison with the Redevelopment Authority, it may assign personnel to carry out liaison duties only, in accordance with Section 3-201 of the Joint Ethics Regulation. If the DON organization or command desires to appoint a military officer to a management position on the Redevelopment Authority (assuming a position is offered), it must ensure that the position is not a "civil office" as defined by 10 U.S.C. 973, which prohibits active duty officers from holding civil office in federal,

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state, or local governments. Whether such an appointment qualifies as a "civil office" depends upon the sovereign powers delegated to the authority, whether the position was created by the legislature, and whether definite duties are imposed by law on the office. Since these cases are very fact-specific, referral of these cases to counsel is strongly recommended. Finally, if the active-duty officer accepts a position on the local Redevelopment Authority in his or her personal capacity, the same civil office prohibition and analysis applies.

Question 6: May a federal employee take official action with respect to a request from a group in which the employee is a leader or member?

Answer: No, 18 U.S.C. 208 prohibits federal employees from taking official action with respect to an organization in which he or she is an officer or director. In addition, 5 C.F.R. 2635.502 prohibits federal employees from taking official action with respect to an organization in which they are active participants.

Question 7: May a federal employee, as a member of a citizens or private group, negotiate or represent the interests of the group before the BRAC or a federal agency?

Answer: No, 18 U.S.C. 205 prohibits federal employees from representing another before a department or federal agency, whether the employee is compensated or not.

Question 8: May a federal employee contribute money to the group?

Answer: Yes, in the employee's personal capacity.

Question 9: May a federal employee solicit funds for the group?

Answer: Yes, as long as the solicitation is

carried out in his or her personal capacity, not in the workplace, not from a subordinate or prohibited source, and without using the employee's position, official title, or authority. (5 C.F.R. 2635.808, Section 3-300 of Joint Ethics Regulation.)

Question 10: May a federal employee be an officer or spokesperson of the organization?

Answer: Yes, in a personal capacity. However, the employee cannot use his or her position or title to imply government sanction or endorsement, (5 C.F.R. 2635.702); cannot use non-public information, (5 C.F.R. 2635.703); cannot use government property or official time (5 C.F.R. 2635.704, 705); and cannot engage in outside activities that conflict with his or her official duties (5 C.F.R. 2635.802).

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